(3)

No. 85-21

Supreme Court, U.S.
FILED
AUG 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY, ET AL., PETITIONERS

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

CHARLES FRIED
Acting Solicitor General

CHARLES F. RULE
Acting Assistant Attorney General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

ROBERT B. NICHOLSON
STEPHEN MAC ISAAC
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

TIMM L. ABENDROTH
Attorney

Interstate Commerce Commission
Washington, D.C. 20423

JIM J. MARQUEZ
General Counsel

ROSALIND A. KNAPP
Deputy General Counsel

Department of Transportation
Washington, D.C. 20590

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), compels dismissal of a claim for damages under the Sherman Act (15 U.S.C. 1) in an action brought by shippers alleging that carriers engaged in conduct that clearly violated a rate bureau agreement approved by the Interstate Commerce Commission.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Discussion	6
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Bigelow v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 9
Board of Trade v. *ICC*, 646 F.2d 1187 14
California v. *FPC*, 369 U.S. 482 10
Carnation Co. v. *Pacific Westbound Conference*, 383 U.S. 213 ..... 7, 9, 12
Chicago Mercantile Exchange v. *Deaktor*, 414 U.S. 113 8
Clark v. *Uebersee Finanz-Korp.*, 332 U.S. 480 17
Continental Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 9
Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359 9
Far East Conference v. *United States*, 342 U.S. 570 12
FMC v. *Seatrain Line, Inc.*, 411 U.S. 726 ..... 11, 17
Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 18
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 11
Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 ..... 4, 9
Hawaii v. *Standard Oil Co.*, 405 U.S. 251 4
Hughes v. *Rowe*, 449 U.S. 5 6
ICC v. *American Trucking Associations, Inc.*, No. 82-1643 (June 5, 1984) 10, 13
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 ..... 4, 9
Keogh v. *Chicago & N.W. Ry.*, 260 U.S. 156 ..... *passim*
Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 12

Cases—Continued: Page

Lower Lake Erie Iron Ore Antitrust Litigation, MDL 587 (E.D. Pa. June 6, 1985) 19
Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219 12
MCI Communications Corp. v. *AT&T*, 708 F.2d 1081, cert. denied, 464 U.S. 891 ..... 10, 13
Minsky v. *Auto Driveaway Co.*, 757 F.2d 718, cert. denied, No. 84-457 (Nov. 13, 1984) 18
Mitsubishi Motors Corp. v. *Soler Chrysler-Plymouth, Inc.*, No. 83-1569 (July 2, 1985) 17
National Gerimedical Hospital v. *Blue Cross*, 452 U.S. 378 11
Niagara Frontier Tariff Bureau, Inc.—Agreement, 297 I.C.C. 494 2
Northern Pac. Ry. v. *United States*, 356 U.S. 1 17
Otter Tail Power Co. v. *United States*, 410 U.S. 366 ..... 9, 10, 17
Pennsylvania R.R. v. *United States*, 363 U.S. 202 8
Phonetele, Inc. v. *AT&T*, 664 F.2d 716, cert. denied, 459 U.S. 1145 10
Rate Bureau Investigation, 349 I.C.C. 811 14
Reiter v. *Sonotone Corp.*, 442 U.S. 330 ..... 17, 18
Ricci v. *Chicago Mercantile Exchange*, 409 U.S. 289 8
Silver v. *New York Stock Exchange*, 373 U.S. 341 ..... 10, 11
Southern Motor Carriers Rate Conference v. *United States*, No. 82-1922 (Mar. 27, 1985) 13
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U.S. 555 9
Strobl v. *New York Mercantile Exchange*, No. 84-7328 (2d Cir. July 5, 1985) 10
Union Labor Life Insurance Co. v. *Pireno*, 458 U.S. 119 11
United States v. *Borden Co.*, 308 U.S. 188 ..... 10, 11
United States v. *Chicago, M., St. P. & P.R.R.*, 294 U.S. 499 8
United States v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 12

Cases—Continued: Page

United States v. *Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,167 2
United States v. *Philadelphia National Bank*, 374 U.S. 321 ..... 10, 11
United States v. *RCA*, 358 U.S. 334 10
United States v. *Western Pac. R.R.*, 352 U.S. 59 8
United States Navigation Co. v. *Cunard Steamship Co.*, 284 U.S. 474 12
Weinberger v. *Hynson, Westcott & Dunning*, 412 U.S. 609 17
Wheat Rail Freight Rate Antitrust Litigation, In re, 759 F.2d 1305, petition for cert. pending, No. 85-112 ..... 18, 19
Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 9

Constitution, statutes and rule:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 12
Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.* 16
Interstate Commerce Commission Act, 49 U.S.C. 10101 *et seq.*:
49 U.S.C. 10101 note 15
49 U.S.C. 10101a(1) 17, 19
49 U.S.C. 10706 2
49 U.S.C. 10706(b)(2) 2
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.* 15
Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 *et seq.* 19
Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 *et seq.*:
§ 5a, 62 Stat. 472 2
§ 5a(6), 62 Stat. 473 3
Sherman Act, 15 U.S.C. 1 *et seq.* 3
Shipping Act, 46 U.S.C. 814 7
Staggers Rail Act of 1980, Pub. L. No. 96-448, § 101(a), 94 Stat. 1897 ..... 17, 19
Fed. R. Civ. P. 23 7

Miscellaneous: Page

H.R. Rep. 96-1069, 96th Cong., 2d Sess. (1980) 15
Interstate Commerce Commission:
37th Annual Report of the Interstate Commerce Commission (1923) 13
Collective Ratemaking in the Trucking Industry (1983) 15
ICC 80 (1981) 16
ICC 83 (1984) 13
D. Wyckoff & D. Maister, *The Motor Carrier Industry* (1977) 15

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-21

SQUARE D COMPANY, ET AL., PETITIONERS

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE UNITED STATES

The issue in this case is whether this Court's decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), should be applied to bar an antitrust damage action based on conduct that, absent the implied immunity created in *Keogh*, would violate the Sherman Act. The United States has primary responsibility for enforcement of the antitrust laws. It therefore has a substantial interest in urging that immunities from the antitrust laws be recognized only where essential to the attainment of other congressional regulatory objectives and only to the extent intended by Congress.

STATEMENT

1. Petitioners are two corporations that purchased trucking services from respondent motor carriers. The carriers are members of respondent Niagara Frontier Tariff Bureau, Inc. (NFTB), a rate bureau that operates pursuant to an Agreement approved by the Interstate Commerce Commission (ICC). Under the Agreement, respondents may set rates collectively and, if they comply with various notice and hearing and record-keeping requirements set forth in the Agreement and ICC regulations, the Reed-Bulwinkle Act immunizes their conduct from challenge under the antitrust laws. See 49 U.S.C. 10706.[1]

In 1983 petitioners filed separate class action complaints[2] alleging that respondents had violated the

[1] 49 U.S.C. 10706(b)(2) codifies Section 5a of the Reed-Bulwinkle Act, ch. 491, 62 Stat. 472. It provides that an ICC-approved Agreement among carriers "may be * * * carried out under its terms and under the conditions required by the [ICC], and the antitrust laws * * * do not apply to parties and other persons with respect to making or carrying out the agreement." The Agreement in this case was approved by the ICC in *Niagara Frontier Tariff Bureau, Inc.—Agreement*, 297 I.C.C. 494 (1955).

[2] The complaints, originally filed in the United States District Court for the District of Columbia, were transferred to the Western District of New York, where a complaint filed by the United States containing essentially the same allegations was then pending. The government suit resulted in a consent decree enjoining respondents from discussing rates except "within an authorized ratemaking body of a rate bureau with a rate agreement," and from "harassing, discouraging, coercing, or threatening in any way any motor carrier to withdraw, forbear from filing, or modify in any way said carrier's planned or actual independent rates." *United States* v. *Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,167, at 66,533 (W.D.N.Y.).

Sherman Act, 15 U.S.C. 1 *et seq.*, by conspiring during a fifteen year period to " 'fix, raise and maintain prices and to inhibit or eliminate competition * * * without complying with the terms of the NFTB [A]greement and by otherwise engag[i]ng in conduct that either was not or could not be approved by the ICC' " (Pet. App. 39a). Specifically, the complaints alleged that the tariffs filed by respondents through the NFTB were set by a clandestine " 'Principals Committee' " in violation of the Agreement. Petitioners also claimed that respondents resorted to "threats, coercion and retaliation" to prevent carriers from exercising their statutory right[3] to file tariffs independently. Petitioners sought monetary and injunctive relief.

Respondents moved for judgment on the pleadings, arguing that petitioners' damages claims were barred by *Keogh* v. *Chicago & N.W. Ry.* (*Keogh*), 260 U.S. 156 (1922). The district court found *Keogh* controlling and dismissed the complaint in its entirety (Pet. App. 43a-50a).[4]

2. The court of appeals, in an opinion by Judge Friendly, affirmed in part and reversed in part (Pet. App. 1a-42a).

Point-by-point, the court of appeals examined why the four factors that formed the basis for the holding in *Keogh* "do not seem so compelling today as

[3] Under Section 5a(6) of the Reed-Bulwinkle Act, 62 Stat. 473, a rate bureau agreement must afford each carrier "the free and unrestrained right to take independent action either before or after any determination arrived at" collectively.

[4] The district court also concluded that the petitioners' allegation of a "broader conspiracy" to inhibit competition involving conduct not related to rates was insufficient to avoid dismissal under *Keogh* (Pet. App. 48a-50a).

they did in 1922" (Pet. App. 9a). First, in response to the concern expressed in *Keogh* that antitrust damages might result in forbidden discrimination among shippers,[5] the court of appeals observed that such fear was "scarcely applicable to class actions" that provide more uniform relief (*id.* at 10a). Second, *Keogh* referred to the difficulty of determining whether the "hypothetical lower rate" proposed as the benchmark for assessing antitrust damages would have been approved by the ICC as reasonable and "non-discriminatory" (260 U.S. at 164). The court of appeals noted (Pet. App. 11a) that in light of the "many later cases" where "similar issues" had been referred to the ICC, the situation was now quite different from that which obtained in 1922. The third factor in the *Keogh* rationale was the difficulty in proving injury because lower rates might have been passed on to shippers' customers. 260 U.S. at 165. But, as the court of appeals commented (Pet. App. 12a), this Court has itself labeled as dictum *Keogh*'s reference to "passing-on" (*Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 491 n.8 (1968)), and recent decisions of this Court appear to reject that rationale altogether. See *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 723-726 (1977); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 263 n.14 (1972); *Hanover Shoe, Inc.*, 392 U.S. at 487-494.

---

[5] This Court noted in *Keogh* that antitrust damages would, in effect, provide to successful plaintiffs a "rebate" not shared by shippers who chose not to sue. Even among several plaintiffs, moreover, it was "highly improbable" that different courts and juries would provide to each the same measure of relief and that, too, would give some shippers a preference over competitors. 260 U.S. at 163.

The court of appeals also questioned as "no longer seem[ing] so self-evident" *Keogh*'s central premise —that a rate the ICC has determined to be "legal" cannot be illegal under the antitrust laws (Pet. App. 13a). The court reasoned that the existence of a "zone" within which a rate might fall and still pass muster under the Interstate Commerce Act would allow shippers to base an antitrust action on the difference between the rate actually charged and the "lower but still reasonable rate that would have prevailed under free competition" (*ibid.*). Moreover, the court noted (*ibid.*) that post-*Keogh* precedent had firmly established that "implied exemptions to antitrust liability are 'strongly disfavored,'" and that "activity could be challenged under the antitrust laws despite the existence of an administrative agency with authority to regulate the activity." Finally, the court found (Pet. App. 15a) that "[t]he case for reaching a contrary conclusion today to that reached" in *Keogh* "is particularly strong in light of recent statutes which rely increasingly on competition rather than regulation to insure the reasonableness of rail and motor carrier rates."

Although the court of appeals found (Pet. App. 3a) "much of the reasoning of *Keogh* * * * outdated," it held that *Keogh*'s "language has not been overruled and that if there is to be an overruling, that task is for the Supreme Court" (Pet. App. 3a). Accordingly, the district court's order was affirmed insofar as it dismissed damage claims based on the respondents' rate-fixing activities.[6]

---

[6] As to petitioners' claims for injunctive relief, however, the court of appeals reversed. It also indicated that petitioners should be allowed to amend their complaints "to state claims for damages other than damages arising from the filed tariffs." Pet. App. 36a-40a.

DISCUSSION

The United States believes that review by this Court is appropriate. In its present posture, the case does not require the Court to decide whether respondents' conduct violated the antitrust laws. Nor does this case implicate the express immunity that would be available under the Reed-Bulwinkle Act if respondents had complied with their ICC-approved Agreement. Rather, deeming the allegations of the complaint to be true,[7] respondents have engaged in conduct that violated the Agreement and that is illegal per se under the antitrust laws. The question presented is whether carriers can violate both their Agreement and the Sherman Act and yet be immune from a treble damage action. Despite its serious doubts about the continued soundness of *Keogh*, the court of appeals felt compelled to affirm the district court's dismissal of the rate-related portions of the complaints. We submit that for the reasons stated by the court of appeals, this Court should consider whether the balance struck in *Keogh* remains a proper formulation for accommodating the objectives of the antitrust laws and the Interstate Commerce Act. Numerous post-*Keogh* developments in antitrust and other areas of the law, and in the regulatory environment, render that 1922 decision an anomaly in 1985. The issue of *Keogh*'s continued vitality is important, for its prohibition of private damage actions in cases of this sort substantially undermines congressional efforts to substitute competition for regulation in the motor carrier and other industries.

---

[7] Since the complaint was dismissed on the pleadings, its allegations must for present purposes be taken as true. See, *e.g.*, *Hughes* v. *Rowe*, 449 U.S. 5, 10 (1980).

1. In *Keogh*, a shipper brought an antitrust action alleging that various railroads had violated the Sherman Act by conspiring to fix tariffs filed with and ultimately approved by the ICC. The Court held that a shipper could not maintain a private antitrust damage action for rates filed with the ICC, advancing for this conclusion the four reasons Judge Friendly addressed below.

As the court of appeals' opinion persuasively demonstrates, developments in antitrust and other areas of the law since 1922 have substantially eroded the foundations of *Keogh*. For example, *Keogh*'s notion that antitrust damages are inimical to a regulatory scheme aimed at preventing discrimination among shippers at the hands of carriers was rejected by this Court in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 219 n.3 (1966).[8] In any event, as the court of appeals noted (Pet. App. 10a-11a), a class action under Fed. R. Civ. P. 23—a procedural device unavailable in 1922—effectively relieves *Keogh*'s fear that piecemeal litigation would result

---

[8] *Carnation* involved an antitrust damage action brought by shippers against water carriers. The shippers claimed that the carriers had fixed rates in a manner that did not qualify for express immunity under Section 15 of the Shipping Act, 46 U.S.C. 814, which, like the Reed-Bulwinkle Act, immunizes collective ratemaking undertaken pursuant to an agreement approved by the regulatory agency. In rejecting the claim that antitrust damages would violate the Shipping Act's objective of preventing discrimination among shippers, this Court stated that "Congress was concerned with assuring equality of treatment by [carriers], not with equality of treatment by juries in collateral proceedings," and noted that "[t]here is no reason to believe that Congress would want to deprive all shippers of their right to treble damages merely to assure that some shippers do not obtain more generous awards than others." 383 U.S. at 219 n.3.

in lack of uniformity and, hence, discrimination among shippers. 260 U.S. at 163.

Similarly, although in 1922 there may have been "no conceivable proceeding" in which the ICC could pass on the validity of a hypothetical rate proposed as the standard for measuring antitrust damages, 260 U.S. at 164, that is not necessarily the case today. As the court of appeals observed, since *Keogh* was decided this Court itself has in "many * * * cases * * * directed the suspension of judicial proceedings pending the referral of similar issues to the ICC" (Pet. App. 11a).[9] Moreover, the fact that a particular tariff filed in violation of an ICC-approved agreement may be "reasonable" does not establish that a lower tariff is unreasonable, *i.e.*, that it would be rejected by the ICC as falling below a "zone of reasonableness * * * between maxima and minima within which a carrier is ordinarily free to adjust its charges." *United States* v. *Chicago, M., St. P. & P. R.R.*, 294 U.S. 499, 506 (1935).

Keogh also expressed apprehension that a shipper would be unable to demonstrate that it was in fact injured, or to present anything but wholly speculative proof on the measure of damages. 260 U.S. at 165. These concerns rested not on any conflict between the antitrust laws and the Interstate Commerce Act but instead on views that this Court has since reconsidered regarding the proof necessary to

[9] See, *e.g.*, *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 62-70 (1956); *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 203-206 (1960). See also *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973) (antitrust action stayed pending administrative determination of validity of defendant's conduct under regulatory statute); *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113 (1973).

sustain an antitrust damage award. In *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. at 491 n.8, this Court characterized as "dictum" *Keogh*'s statement that a shipper might not be able to prove damages because a lower rate might have been "passed-on" to its customers. And this Court's decision in *Illinois Brick Co.* v. *Illinois*, *supra*, established that *only* those parties who, like petitioners, purchase directly from a defendant can recover antitrust damages.[10]

Finally, one of *Keogh*'s basic premises—that because Congress provided some form of regulatory relief it could not have also intended to provide an antitrust remedy—is not tenable today. This Court repeatedly has held that the existence of a remedy under a regulatory statute does not, standing alone, preclude a plaintiff from seeking relief under the antitrust laws. See, *e.g.*, *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. at 224 (availability of reparations under the Shipping Act does not bar damage award in antitrust suit); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 373-375 (1973) (Federal Power Commission's authority to compel interconnection does not preclude court from ordering interconnection in an antitrust action);

[10] In numerous cases decided subsequent to *Keogh*, this Court has emphasized that an antitrust plaintiff is not required to demonstrate the amount of its damages with "mathematic precision." See, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123-125 (1969); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 & n.7 (1962); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 263-265 (1946); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 561-566 (1931); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 378-379 (1927).

United States v. *Philadelphia National Bank*, 374 U.S. 321, 351-352 (1963) (banking agency's approval of merger does not bar Clayton Act challenge); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963) (neither the Securities Exchange Act nor stock exchange rules posed a legal barrier to antitrust action); *United States* v. *RCA*, 358 U.S. 334, 344 (1959) (Federal Communications Act does not bar antitrust suit against television and radio licensees); *United States* v. *Borden Co.*, 308 U.S. 188, 195-199 (1939) (neither the Agricultural Adjustment Act nor the Capper-Volstead Act displaced the Sherman Act); *California* v. *FPC*, 369 U.S. 482 (1962) (Clayton Act not displaced by the Natural Gas Act).[11] Lower courts have similarly rejected arguments that a regulatory remedy precludes antitrust relief. See, *e.g.*, *Strobl* v. *New York Mercantile Exchange*, No. 84-7328 (2d Cir. July 5, 1985), slip op. 5028-5031; *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081, 1102-1103 (7th Cir.), cert. denied, 464 U.S. 891 (1983); *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716, 734-735 (9th Cir. 1982), cert. denied, 459 U.S. 1145 (1983).

2. Continued application of *Keogh* is also inconsistent with this Court's numerous subsequent holdings that implied immunity from the antitrust laws is disfavored. Because the antitrust laws embody "fundamental national policies" favoring competition (*Otter Tail Power Co.* v. *United States*, 410 U.S. at

[11] Indeed, in *ICC* v. *American Trucking Associations, Inc.*, No. 82-1643 (June 5, 1984), this Court stated (slip op. 6) that "[w]henever the Commission finds an effective tariff unlawful, injured parties can recover both damages under [the Interstate Commerce Act] and whatever additional amounts the antitrust laws allow"; see also slip op. 7 (O'Connor, J., dissenting).

374), implied immunity is appropriate only where there is a "plain repugnancy between the antitrust and regulatory provisions" (*United States* v. *Philadelphia National Bank*, 374 U.S. at 350-351) (footnote omitted), and even then "only to the minimum extent necessary [to] make the [statutory scheme] work." *Silver* v. *New York Stock Exchange*, 373 U.S. at 357. In short, as this Court noted in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 787 (1975), "our cases have repeatedly established that there is a heavy presumption against implicit exemptions." See also *Union Labor Life Insurance Co.* v. *Pireno*, 458 U.S. 119, 126 (1982); *National Gerimedical Hospital* v. *Blue Cross*, 452 U.S. 378, 388-389 (1981); *FMC* v. *Seatrain Line, Inc.*, 411 U.S. 726, 733 (1973).

The presumption against implied antitrust immunity is particularly compelling where, as here, Congress has crafted a regulatory scheme that provides for express antitrust immunity. Under such circumstances the scope of immunity should not extend beyond the limits laid down by statute, because "[i]f Congress had desired to grant any further immunity, Congress doubtless would have said so." *United States* v. *Borden Co.*, 308 U.S. at 201. It strains credulity to suggest that, in granting express immunity in the Reed-Bulwinkle Act for collective ratemaking undertaken in conformity with an ICC-approved Agreement, Congress intended to immunize conduct that violates such an Agreement and thereby subverts both the Reed-Bulwinkle Act and the Sherman Act.[12] Collective ratemaking out-

[12] We agree with the court of appeals that Congress did not "overrule" *Keogh* in passing the Reed-Bulwinkle Act (Pet. App. 25a). But there is also no indication that in passing that

side the scope of an expressly immunized Agreement is naked price fixing; allowing shippers to bring private damage actions would further both regulatory and antitrust objectives by ensuring that carriers comply with the terms of their ICC-approved Agreement when they set rates collectively rather than competitively.

Nor would antitrust damages subject respondents in this case to "duplicative and inconsistent standards," or otherwise interfere with the operation of the regulatory scheme. See *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 735 (1975). As the court of appeals noted (Pet. App. 14a n.3), an antitrust damage award premised on a rate lower than that filed by a carrier would not necessarily pose even a theoretical inconsistency

---

Act Congress intended to fix by legislative fiat the balance this Court struck in *Keogh* in 1922 between the Interstate Commerce Act and the antitrust laws. The issue in this case is whether *Keogh*'s judicially-crafted immunity currently provides the proper accommodation of the Sherman Act and a particular regulatory scheme. In the 63 years since *Keogh* was decided this Court's approach to implied immunity questions has evolved substantially; over the same period of time there have been significant changes in the regulatory environment governing respondents' conduct. There is thus no reason to conclude that the result reached in *Keogh* is "cast in bronze." *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 421 n.2 (1978) (Burger, C.J., concurring). Cf. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 229-235 (1948) (coverage of Sherman Act evolves with changing judicial conceptions of congressional power under the Commerce Clause). Compare *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. at 220-222, with *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932) and *Far East Conference* v. *United States*, 342 U.S. 570 (1952).

with the ICC's regulatory authority.[13] Moreover, as a practical matter, it is extremely unlikely that damage actions would result in any actual interference with the ICC's exercise of its regulatory authority because, as this Court noted in *ICC* v. *American Trucking Associations, Inc.*, No. 82-1643 (June 5, 1984), slip op. 6 n.4, the ICC is currently capable of reviewing only an insignificant fraction of the total tariffs filed.[14] There may be cases where the ICC has reached a specific determination that would foreclose certain issues in an antitrust action.[15] When

---

[13] Unlike the situation in *Southern Motor Carriers Rate Conference* v. *United States*, No. 82-1922 (Mar. 27, 1985), where the challenged conduct was contemplated under a state regulatory scheme, here it is alleged that respondents violated the ICC-approved ratemaking Agreement. Of course, the present case does not implicate the considerations of comity that informed the Court's decision in *Southern Motor Carriers*.

[14] In 1983 the ICC examined 188 tariffs out of 1.2 million filed, and suspended 11 (Pet. App. 14a n.3); see Interstate Commerce Commission, *ICC 83*, Tables 6 & 8, at 113-114 (1984). By contrast, at the time *Keogh* was decided the total number of tariffs filed annually was approximately eight percent of what it is today. See Interstate Commerce Commission, *37th Annual Report of the Interstate Commerce Commission* 37 (1923) (94,780 tariffs filed). In view of the 1200% increase in tariff filings between 1923 and 1983, in today's regulatory environment the ICC's decision not to investigate a particular tariff surely cannot be regarded as tantamount to regulatory approval. See, *e.g.*, *MCI Communications Corp.* v. *AT&T*, 708 F.2d at 1104-1105 (where agency is able to investigate only a "small percentage" of 1,371 tariffs filed annually, tariff that agency has neither "dictated nor approved" is not immune from antitrust challenge).

[15] Thus, a finding that the challenged conduct was within the terms of the approved Agreement would trigger express immunity under the Reed-Bulwinkle Act. Were respondents

that occurs, steps may be taken, or rulings made, that are suitable to the particular circumstances. But that flexibility is unavailable if *Keogh* is read broadly and applied automatically. Simply because an antitrust damage action might in some cases conflict with a specific ICC determination does not warrant the conclusion that, as a matter of law, no such antitrust damage actions should be permitted. Here, the petitioners allege that respondents have engaged in conduct that was not approved, and could not be approved, by the ICC. Respondents' claim to immunity is therefore reduced to a talismanic invocation of *Keogh*, and should be rejected.[16]

3. The issue this case presents is important, and review by this Court is needed to ensure that congressional efforts to promote competition in the motor carrier and other once extensively regulated industries are not frustrated.

As the facts of this case demonstrate, carriers armed with *Keogh* immunity have a strong incentive to form cartels that flout the intent of Congress in

---

to contest whether their conduct in fact violated the ICC-approved Agreement, that issue could be referred to the ICC for determination in the first instance. See *Board of Trade* v. *ICC*, 646 F.2d 1187, 1193 (7th Cir. 1981). The doctrine of primary jurisdiction is, of course, not absolute; it requires referral only where the agency's expertise is necessary to an informed judicial determination. See note 9, *supra*.

[16] The ICC has taken the position that "relief from the antitrust laws * * * obtains only where the approved agreement is carried out strictly in conformity with its provisions and within the terms and conditions prescribed by this Commission" (*Rate Bureau Investigation*, 349 I.C.C. 811, 824 (1975)).

conferring limited express immunity in the Reed-Bulwinkle Act. *Keogh* thus insulates a large and important segment of the national economy from the salutary effects of the antitrust laws.[17] The need to reexamine *Keogh* is all the more pressing in light of Congress's decision, in passing the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.*, substantially to reduce the regulation of the motor carrier industry.[18] Congress determined that "protective regulation" had given rise to both "operating inefficiencies" and "anticompetitive pricing," 49 U.S.C. 10101 note (Congressional Findings and Declaration of Policy), and in order to combat these problems it greatly relaxed entry restrictions, and

---

[17] As of 1980, almost half of the motor carrier industry was subject to ICC regulation (see H.R. Rep. 96-1069, 96th Cong., 2d Sess. 2 (1980)), and that percentage is likely to increase as a result of the relaxed entry standards under the Motor Carrier Act of 1980. In 1979, total revenues in the domestic motor carrier industry (*i.e.*, ICC-regulated carriers and others) amounted to 142.7 billion dollars, and motor carrier services accounted for 24% of total domestic transportation ton-miles. See ICC, *Collective Ratemaking in the Trucking Industry* 72 (1983). Taken together, motor carrier and rail expenditures comprise approximately 93% of total domestic freight transportation expenditures. *Ibid.* Expenditures for domestic freight and passenger transportation consistently account for approximately 20% of gross national product; freight transportation expenditures alone consistently account for approximately nine percent of gross national product. See D. Wyckoff & D. Maister, *The Motor Carrier Industry*, Table I-1, at xxv (1977). Anticompetitive pricing in a basic industry such as transportation, of course, has ramifications throughout the economy.

[18] For a summary of the changes wrought by the Motor Carrier Act of 1980, see *Collective Ratemaking in the Trucking Industry*, *supra*, at 24-25.

narrowed the scope of express immunity available under the Reed-Bulwinkle Act.[19]

The Motor Carrier Act of 1980 is but one example of several recent major pieces of legislation that unmistakably reflect Congress's determination that consumer welfare would be better served if regulated entities were subject, to a much greater extent than in the past, to the free play of competitive forces. The details of deregulation, of course, vary from industry to industry, but the basic thrust of congressional intent—particularly in the domestic transportation sector—could not be clearer: Competition rather than regulation is the order of the day.[20] Since

[19] Although the conduct forming the basis for the complaints here occurred largely if not entirely before the effective date of the Motor Carrier Act of 1980, the rule announced by the court of appeals appears broad enough to permit carriers to argue that post-1980 conduct is immunized as well. Moreover, in the Motor Carrier Act Congress determined that the regulatory scheme applicable prior to 1980 was deficient precisely because it resulted in anticompetitive pricing (see page 15, *supra*). This finding, and the legislative attention it prompted, undermine any argument that allowing an antitrust damage action for pre-1980 conduct outside the scope of express immunity under the Reed-Bulwinkle Act would frustrate congressional intent. Well before the 1980 legislation, the regulatory and decisional premises on which *Keogh* was based had been markedly superseded (Pet. App. 9a-15a), and the practical limits of the ICC's regulatory oversight had been strained by the burgeoning number of tariff filings. Compare Interstate Commerce Commission, *ICC 80*, Table 7, at 113 (605,538 tariffs filed in 1980) with *37th Annual Report of the Interstate Commerce Commission, supra*, at 37 (94,780 tariffs filed in 1923).

[20] See, *e.g.*, Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 *et seq.* (amending Federal Aviation Act of 1958 "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services"); Staggers

conduct is now initiated more "by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policy embodied in the antitrust laws." *Otter Tail Power Co.* v. *United States*, 410 U.S. at 374; *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. at 737. That policy, of course, is to promote consumer welfare by encouraging vigorous price competition. See, *e.g.*, *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979); *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 4-5 (1958). And as this Court stated recently in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, No. 83-1569 (July 2, 1985), slip op. 20, "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators."

Conversely, a mechanical application of *Keogh* would " 'impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.' " *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 631 (1973), quoting *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 489 (1947). If the court of appeals is correct that *Keogh* bars private damage actions "whenever tariffs have been filed" (Pet. App. 6a-7a), congressional efforts to promote competition will be severely impeded. Although Congress has greatly limited the substantive authority of the ICC with respect to rail and motor carrier rates, it has not eliminated all regulatory

Rail Act of 1980, Pub. L. No. 96-448, § 101a, 94 Stat. 1897 (codified at 49 U.S.C. 10101a(1)) (in public interest "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail").

oversight. Tariff filing requirements form the foundation of the regulatory regimes administered by the ICC, and these requirements will presumably remain in effect as long as the Commission is empowered to exercise any authority whatsoever with respect to rates. Accordingly, if *Keogh* continues to bar private damage actions whenever a tariff has been submitted to—but not specifically rejected by—the ICC, the perverse result of congressional attempts to encourage competition will be that carriers are free from both regulatory scrutiny and the potent incentive damage actions provide to obey the commands of the antitrust laws.[21]

The decision in this case is but one of several where the lower federal courts have concluded that *Keogh* immunizes carriers from damage liability for activities that are illegal per se under the antitrust laws and outside the scope of express immunity under the Reed-Bulwinkle Act. See *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305 (7th Cir. 1985), petition for cert. pending, No. 85-112; *Minsky* v. *Auto Driveaway Co.*, 757 F.2d 718 (7th Cir. 1984), cert. denied, No. 84-457 (Nov. 13, 1984); *In re Lower Lake Erie Iron Ore Antitrust Litigation*, MDL 587

[21] Petitioners, being intimately familiar with the industry, are in the best position to monitor the respondents' day-to-day compliance with their ICC-approved Agreement, and have powerful incentives to sue when carriers violate the Agreement. See *Reiter*, 442 U.S. at 344 ("private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations"). Thus, this case is of substantial importance to the economy, even though, under *Keogh*, the government may institute enforcement actions and private parties may sue for injunctive relief. See *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945).

(E.D. Pa. June 6, 1985). Rote application of *Keogh*'s antitrust immunity under such circumstances thwarts competition without providing any benefit to the operation of the regulatory scheme. Thus, review in this case is warranted.[22]

[22] *Keogh* was applied in *In re Wheat Rail Freight Rate Antitrust Litigation, supra*, for example, as a bar to an antitrust damage action against rail carriers in a case where the ICC was precluded by statute from assessing the reasonableness of the rates in question and the *only* regulatory authority the Commission could exercise was whether the rates were discriminatory. The Seventh Circuit's decision thus amounts to a holding that as long as the ICC has any authority over rates, an antitrust action is barred. This outcome flies in the face of Congress's decision in the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 *et seq.*, and the Staggers Rail Act of 1980, Pub. L. No. 96-448, § 101(a), 94 Stat. 1897, to allow "to the maximum extent possible, competition * * * to establish reasonable rates for transportation by rail." 49 U.S.C. 10101a(1). A petition for a writ of certiorari in *In re Wheat Rail Freight Rate Antitrust Litigation* is currently pending before the Court (No. 85-112), and if the Court grants review in the present case it may wish to postpone consideration of the petition in No. 85-112 for disposition in light of its decision here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

CHARLES F. RULE
Acting Assistant Attorney General

JERROLD J. GANZFRIED
Assistant to the Solicitor General

ROBERT B. NICHOLSON
STEPHEN MAC ISAAC
Attorneys

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

TIMM L. ABENDROTH
Attorney
Interstate Commerce Commission

JIM J. MARQUEZ
General Counsel

ROSALIND A. KNAPP
Deputy General Counsel
Department of Transportation

AUGUST 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10270